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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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JAN 27 1993

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In the Matter of

Implementation of Sections of the
Cable Television Consumer Protection
and Competition Act of 1992

Rate Regulation

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MM Docket No. 92-266

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JAN 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**COMMENTS OF THE NEW YORK STATE
COMMISSION ON CABLE TELEVISION**

New York State Commission
on Cable Television
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January 26, 1993

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Table of Contents

	Page
SUMMARY	ii
PART I	2
A. Effective Competition	3
B. The Commission's Authority to Regulate Basic Service Rates	5
C. Regulation of Cable Programming Services	9
PART II	12
A. Components of Basic Service Tier Subject to Regulation	12
B. Regulation of Basic Service Tier	14
C. Customer Changes	19
D. Implementation and Enforcement of Basic Service Tier Rates	22
E. Complaint Procedure; Rate Reduction and Refund Procedures for Rates Found to be Unreasonable	26
F. Subscriber Bill Itemization	28

SUMMARY

-- Congress did not confer power on the Commission to regulate the rates for basic cable service directly except in accordance with Section 623(c) which requires a prior decision by each franchising authority to seek certification. The jurisdiction of franchising authorities to regulate basic service rates is based entirely on state and local law. The Commission cannot confer such jurisdiction on franchising authorities or on itself.

-- The determination of whether a cable system is subject to effective competition must be based on the situation in each franchise area. The rates for basic cable service must be uniform throughout each franchise area. The rates for cable programming services should be uniform throughout the entire area served by a single cable system.

-- The Commission should permit state level cable regulatory agencies to seek a blanket certification on behalf of municipal franchising authorities within its jurisdiction seeking to regulate rates.

-- The Commission should permit state level cable regulatory agencies to make an initial determination on the reasonableness of rates for cable programming services, in compliance with Commission standards and procedures, and subject to possible review by the Commission.

-- The Cable Act of 1992 requires a single tier of basic cable service and precludes the offering of services on a stand alone or a la carte basis without such entry-level service.

-- Cable television rates for basic service and cable programming services established after the effective date of the 1992 Act are subject to review in accordance with the Commission's standards promulgated in this proceeding. If any such rate is found to be excessive or is subject to reduction, the cable operator may be required to provide a credit or refund for past amounts paid by subscribers from the effective date of the rate through the date of reduction. Rates that remain unchanged from the effective date of the Act are also subject to review and may be rolled back.

-- Whenever a cable operator retiers its services, subscribers affected by such retiering should be able to change their services at no charge during a reasonable period of time from the date of the change. Subscribers should also be entitled to change service tiers without charge whenever a cable programming service is removed from the system altogether, or is moved from one tier to another.

-- The Commission should adopt regulations on subscriber bill itemization consistent with the Congressional intent manifest in the House Report to the effect that franchise fees shall not be billable directly to the subscribers as a separate and distinct charge.

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**COMMENTS OF THE NEW YORK STATE
COMMISSION ON CABLE TELEVISION**

1. The New York State Commission on Cable Television ("NYSCCT") respectfully submits initial comments in response to the Notice of Proposed Rulemaking ("NPRM") released in this docket December 24, 1992. NYSCCT is an independent Commission with broad authority to promote and oversee the development of the cable television industry in the State of New York. NYSCCT is expressly authorized by Section 815(6) of the Executive Law of the State of New York to represent the interests of the people of the State before the Federal Communications Commission ("Commission").

2. These comments will be presented in two parts. In Part I, we identify certain fundamental changes effected by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Cable Act") relevant to this proceeding and address some of the more general issues raised by them and the Commission. In Part II, we address specific aspects of these changes and other issues as presented in the NPRM. Issues that are not addressed herein will be addressed by NYSCCT in reply comments in this docket.

3. We also take the opportunity of this proceeding to provide the Commission with a compilation of cable television rates in New York State prepared as of December, 1992 and showing rates and number of channels offered on basic service in 1984 and for expanded basic service in 1989 and 1992.

PART I

4. Section 3 of the Cable Act of 1992, which amends Section 623 of the Cable Act of 1984, changes federal law applicable to cable television rates in at least three fundamental ways relevant to this proceeding. First, it contains a definition of "effective competition" that is substantially different (and in our view, far more reflective of the actual sources of competition to cable systems in the marketplace) from the definitions previously promulgated by the Commission. As a result of this change, most cable television systems in the nation will be subject to the rate regulatory provisions of the new statute at this time. Second, new Section 623 confers jurisdiction upon the Commission to regulate rates for basic cable service directly in certain defined instances. Third, also for the first time, federal statutory law subjects to regulatory oversight the rates charged by cable television operators for tiered programming offered in addition to the basic service tier. In addition, Section 623(d) purports to require that a cable operator have a uniform rate structure "throughout the geographic area in which cable service is provided over its cable system." This new provision is relevant to the manner in which the Commission seeks to implement each of the three fundamental changes. We will address these issues generally in the order that they are raised.

A. Effective Competition

5. Whereas "effective competition" has been defined by the Commission solely by reference to the number of unduplicated local television broadcast stations available throughout the franchise area (47 C.F.R. Section 76.33), local broadcast stations are essentially irrelevant to a determination of effective competition under the new statutory definition. Congress has now defined effective competition in terms either of the number of subscribers to a cable system or the existence of other multichannel video programming distributors in the franchise area.¹ In respect to the latter, one or more competing multichannel services must be available to a significant portion (50% of the households) of the franchise area and must actually sell video programming to at least 15% of all households in the franchise area.

6. The term "multichannel video programming distributor" is defined in Section 602(12) of the statute to include a cable system and various alternative technologies. The Commission asks whether additional entities such as "a telephone company offering a 'video dialtone'. . .or a television broadcast station offering multi-channel service" would meet the definition. (NPRM, para. 9) The Commission also makes reference in footnote 15 of the NPRM to the pending rulemaking in MM Docket No. 92-259 concerning the must-carry provisions of the Cable Act of 1992 wherein it asks whether the definition of multichannel video programming distributor includes MATV or SMATV systems. In

¹ The question of whether the existence of effective competition is determinable by reference to each individual franchise area, for purposes of determining the authority to regulate basic cable rates, but may be evaluated by reference to the entire geographic area of a single cable system for purposes of applying the standards applicable to rates for cable programming services is addressed infra., para. 26.

addition, the Commission seeks comment on whether there may be certain minimum channel offerings of a multichannel programming distributor in order for it to constitute a competitive alternative to cable television.

7. At the outset, we note that by eliminating broadcast stations as a basis for effective competition, Congress must be presumed to have intended that a competitive multichannel video programming distributor provide more video programming than is available on local over-the-air television broadcast stations. Whether there is some minimum number of non-local broadcast stations or other programming services necessary to fulfill the Congressional intent is arguable.² Since the more practical consideration is likely to be the scope of the availability of these alternate delivery systems and the number of subscribers to them, it is suggested that video dialtone, SMATV and MATV should be presumed to be a multichannel video programming distributor within the definition of effective competition. (As noted by the Commission in paragraph 9 of the NPRM, such a presumption "might be subject to rebuttal by an opposing party.")

8. In applying the definition of effective competition, the Commission proposes to count "each separately billed or billable customer as a household," and also to "measure penetration for purposes of the second test cumulatively." (NPRM, para. 8, 9) NYSCCT is in accord with these tentative views of the Commission. We also agree with the tentative conclusion of the Commission that the franchising authority should make the initial

² Perhaps 50% of the capacity of the cable system not used for local broadcast stations would be a realistic standard. In any event, it should be observed that the channel capacity and the number of video programming services offered by cable operators varies from system to system.

determination as to whether effective competition exists.³ This is a reasonable and proper policy given the number of determinations to be made, the limited resources of the Commission and the likelihood that the lack of effective competition will probably not be seriously challenged by many cable television operators. In this regard, however, there is a considerable lack of information concerning both the scope of alternative delivery systems, where they exist, and the number of subscribers. For example, there is an MMDS service in the Albany, New York area which provides multiple channels of programming to a large area encompassing the service area of a number of cable television systems. NYSCCT is not aware of any reliable public source of information concerning either the total number of subscribers that may exist for such service or the geographic distribution of same. The Commission should adopt rules requiring federally licensed services to disclose appropriate data.

B. The Commission's Authority to Regulate Basic Service Rates

9. The Commission asks a variety of questions concerning its authority over basic service rates relative to the authority of franchising authorities. (NPRM, para. 15, 16) For example, the Commission asks for comment on its view that its power to regulate basic service rates exists only where a franchising authority first seeks certification and certification is either denied or, if granted, is later revoked. (NPRM, para. 15) The Commission also asks, generally, about the appropriate view of the basis for the authority

³ The Commission should also consider "delegating" the initial determination as to whether rates for cable programming services are unreasonable to any state level cable regulatory agency with jurisdiction over an entire cable system. (Infra., para. 19).

of franchising authorities to regulate rates including, particularly, whether such authority derives from state and local law or from federal law and whether FCC regulation of basic service in states where rate regulation is prohibited would constitute federal preemption.

10. NYSCCT agrees with the Commission's tentative conclusion in Paragraph 15 that the Commission may not regulate basic service rates directly unless it has denied or revoked a franchising authority's certification. We also believe that the authority to regulate rates must be contained in state law and cannot be conferred by the Commission either on a franchising authority or itself.

11. As a general matter, NYSCCT submits that Section 623 must be read, to the extent possible, consistent with traditional notions of our federal system and that, absent a clear intent by Congress, Section 623 should "not be deemed to have significantly changed the federal-state balance." (Bowen v. American Hospital Association, 476 U.S. 610, 644 (1986); see also Borough of Schuylkill Haven v. Time Warner, 784 F.Supp. 203 (E.D.Pa., 1992)) In this context, NYSCCT believes it is important to compare the language in existing Section 623 with the original language of the 1984 Cable Act which Congress repealed. Section 623(b) of the 1984 Act provided, in pertinent part, that "the Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service. . . ." Given the use of the word "authorize" it is at least arguable that in the 1984 Act, Congress purported to empower local governments to engage in the regulation of basic cable service.⁴ The language of Section 623 of the 1992

⁴ The Commission suggests that the 1984 Act "appeared to assume that a franchising authority derives its powers, including those to regulate rates, from state law or franchise agreements. (NPRM, para. 20 citing Section 602(10), formerly 602(9) which defines

Act is sufficiently different from the language in the 1984 Act to rebut any contention that Congress intended to upset the traditional federal-state balance by conferring ratemaking authority on local governments. Section 623(a)(2) provides, in part, that:

"if the Commission finds that a cable system is not subject to effective competition - (A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b); and (B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c)."

Thus, the new statute does not "authorize" a franchising authority to regulate rates. Rather, it subjects basic rates to regulation by a franchising authority in the discretion of the franchising authority.

12. As noted by the Commission, the standards to be employed for determining whether or not to certify a franchising authority to regulate rates include whether or not the franchising authority "has the legal authority to adopt, and the personnel to administer, such regulations." This language, too, suggests that the authority of a franchising authority must derive from some source other than Congress or the Commission. If Congress had intended to confer power directly on franchising authorities, it could have merely required that the Commission's regulations be applicable to every franchising authority without any intervening need for affirmative action by the franchising authority. Moreover, if Congress had intended the Commission to have preemptive authority it would not have made state and local laws and regulations inconsistent with the Commission's

"franchising authority" to mean "any governmental entity empowered by Federal, State or local law to grant a franchise." This definition remains unchanged.

regulations the basis for revocation and jurisdiction but rather would have stated simply that Commission regulations shall supersede such state and local laws and regulations.

13. Finally, and, arguably dispositive in itself, is Section 623(a)(6) of the statute which refers specifically to the "franchising authority's regulatory jurisdiction under paragraph 2(a)" in the same sentence where it requires the Commission to exercise jurisdiction only after it disapproves or revokes a franchising authority's certification.

14. For these reasons, NYSCCT agrees with the Commission that its jurisdiction pursuant to Section 623 to regulate basic rates directly is limited only to circumstances where a franchising authority is both authorized by state law to regulate rates and exercises such jurisdiction by seeking, but not perfecting or sustaining, certification. This conclusion is consistent with the possibility that a determination by a local government not to regulate basic service may be a reasonable decision given the fact that basic service rate regulation will encourage every cable operator to offer a basic service limited only to local broadcast stations and PEG channels. For example, if a cable operator historically has offered an expanded basic service on reasonable terms and conditions, a franchising authority may seek to induce the operator to continue such service by not seeking certification to regulate it. Such deferral of certification would also relieve the franchising authority and the cable operator from the potential burdens of Section 623(c). In addition, a franchising authority might determine that the burden of regulating rates for a minimum basic service is not warranted because of the few subscribers who choose only that level of service.⁵

⁵ In New York State, a recent sampling of five of the state's larger MSOs that provide a broadcast basic service shows that of over 1.7 million subscribers only about 1.34% or approximately 23,000 choose basic service only.

C. Regulation of Cable Programming Services

15. Section 623(2)(b) provides that if a cable system is not subject to effective competition "the rates for cable programming services shall be subject to regulation by the Commission under Subsection (c)." Subsection (c) requires: "criteria. . .for identifying, in individual cases, rates for cable programming services that are unreasonable;. . . ." (623(c)(1)(A)) It also requires the promulgation of procedures for (1) the receipt, consideration and resolution of complaints, (2) the reduction of rates that are determined to be unreasonable, and (3) refunding rates that were paid after the filing of a successful complaint. Except during the 180 day period following the effective date of the rules, all subsequent complaints must be filed within a reasonable time following a change in rates, or a change in tiers that results in a change in rates.

16. The dual system for regulating cable rates presents formidable issues for the Commission. The challenge to the Commission in implementing the statutory requirements concerning regulation of rates for cable programming services is even greater because Congress has appeared to confer standing to challenge the reasonableness of such rates not only upon franchising authorities but also upon other non-franchising governmental entities and even subscribers. Indeed, it fully appears that a single subscriber in any cable system may now invoke the jurisdiction of the Commission by a timely complaint in conformance with the Commission's standard for a minimum showing.

17. NYSCCT submits that it is possible for the Commission to mitigate the substantial potential burden of administering Section 623(c) through the adoption of certain policies. First, we think the provisions of Section 623(d) concerning a "uniform rate

structure throughout the geographic area" should apply only to the franchise area, for basic service rates. We also believe that the Commission has ample discretion to apply the uniformity requirement to the entire cable system for purposes of determining the reasonableness of rates for cable programming services. The benefits of such a policy are apparent. In New York State, for example, there are approximately 1,400 separate franchise areas served by 258 cable television systems. By applying 623(d) to rates for non-basic services, and thereby requiring cable companies to offer uniform rates for cable programming services throughout an entire cable system, the Commission could reduce the potential number of proceedings in New York by as much as eighty percent. There is every reason to assume that a similar reduction would occur nationwide. This policy, in and of itself, may not necessarily reduce the number of complaints received but it certainly will lessen the burden on cable operators and the Commission's related decision making proceedings.

18. Second, in paragraph 102 of the NPRM, the Commission states that "[t]he difficulties that ordinary subscribers may face in drafting complaints may make it advisable to enlist the franchising authorities' expertise." The Commission states further that ". . .the concurrence of the local franchising authority. . .might also ensure that our resolution of a cable programming service rate dispute did not undermine the franchising authority's regulation of basic cable service rates." (NPRM, para. 102) The Commission then invites comment on "whether subscribers should be permitted or required, to obtain a franchising authority's decision or concurrence as a precondition to the filing of a valid complaint." (Id.)

19. As a general matter, we think that some formal involvement of the franchising authority on any complaint challenging the rates for cable programming services, including a complaint made by a governmental entity other than the franchising authority, is supportable. More particularly, we would urge the Commission to adopt rules whereby it could delegate the first instance determination of the reasonableness of cable programming service rates to any state level franchising authority or cable regulatory agency that has jurisdiction over the entire geographic area served by the affected cable system. For example, in New York State, while municipal governments may grant authority for the construction of cable systems within their boundaries, each such grant is subject to the review and affirmative approval by NYSCCT. (New York Executive Law, Section 821) In addition, any transfer, renewal or amendment of the terms and conditions of a franchise is also explicitly subject to the review and approval of NYSCCT. (New York Executive Law, Section 822) Thus, if NYSCCT were to seek approval from the Commission to make an initial determination on a complaint for unreasonable rates, its action would have the effect of determining the matter for an entire cable system. This would ease the burden on the Commission in those cases where the NYSCCT decision was accepted by the parties. It would likewise ease the burden on local franchising authorities in respect to a totally unpredictable and potentially enormous number of subscriber complaints which might be triggered by a rate increase for cable programming services.⁶

⁶ One of the difficulties inherent in the regulation of rates by municipal governing bodies is the fact that the decision makers are elected officials. Thus, any determination of a rate or proposed rate increase is susceptible to political considerations. The fact that local franchising authorities do not have any direct decision making power over a rate for cable programming services does not eliminate the political implications for the elected officials.

20. A determination by the Commission to permit such franchising authorities to make an initial determination of the reasonableness of cable programming services upon complaint is perfectly consistent with the Commission's tentative conclusion that franchising authorities should make the initial determination of whether a cable system lacks effective competition subject to Commission review if challenged (*supra*, para. 8). Moreover, this policy would not deprive any party of the opportunity to register a complaint nor impose any additional burden on cable operators.

PART II

A. Components of Basic Service Tier Subject to Regulation

21. In paragraphs 10-13 of the NPRM, the Commission discusses the components of the basic service tier subject to regulation. In paragraph 11, the Commission asks how the retransmission consent provisions will affect the composition of the basic service tier and offers a tentative conclusion that any local signal carried pursuant to retransmission consent would be a basic tier channel. We concur. However, it is not entirely clear that if a cable operator has already satisfied its must carry signal obligations, and thereafter negotiates retransmission rights with a local broadcast station that did not elect must carry, that the cable operator should be obligated independent of the retransmission agreement itself to add the affected signal to basic service. However rare

The mere authority to complain to the Commission about the level of rates and, particularly, the fact that subscribers within the franchise area are constituents of every local elected official and may formally complain creates a political dimension to what should be an objective proceeding.

such instances might be, it is not necessary to override the minimum requirements of new Section 614 of the Act which does not require the cable operator to carry all local signals if the number exceeds a certain minimum amount or if carriage would require duplication. Accordingly, the Commission might determine to leave the matter of the cable operators' legal obligation to carry the station on basic service in such circumstances to the provisions of the retransmission agreement. Finally, we agree with the Commission's tentative finding that cable operators may add such additional video programming services as they like to basic service, provided all such services are subject to rate regulation given the plain statutory language.

22. In paragraph 12 of the NPRM, the Commission refers to Section 623(b)(7)(A) which defines basic service as a tier "to which subscription is required for access to any other tier of service." Congress has defined the term "service tier" in Section 601(16) to mean "a category of cable service⁷ or other services. . .for which a separate rate is charged. . . ." The question raised is whether a "tier" of service need contain more than one video programming service. Although the term "cable programming service" is defined in Section 623(1)(2) in such a manner as to preclude services offered on a per-channel or per-program basis, it is not defined in any way that would be inconsistent with the conclusion that a service sold on a per-channel basis could constitute a single tier. Accordingly, we believe that statutory language does establish a "basic buy-through requirement" and prohibits the offering of "a la carte" services independent of subscription

⁷ Cable service is defined as the "one-way transmission of video programming. . . ." (Section 602(5)(A))

to the basic service tier. We also believe that Congress did not intend to give consumers the option of purchasing premium channels or leased access channels on a stand alone basis. We concur with the Commission that the anti-buy through provisions of Section 623(b)(a)(A) preclude an operator from requiring the purchase of any services in addition to the basic tier as a precondition for ordering other programming.

23. In paragraph 13 of the NPRM, the Commission notes that Congress did not amend the definition of basic service as contained in the 1984 Act but that Section 623(b)(7)(A) specifying the minimum contents of the basic service tier reveals a current intent that the basic service tier shall be a single tier. We agree with the Commission's interpretation that the Cable Act of 1992 requires the existence of a single tier of basic service. We further believe that the interpretation of the 1984 Act as contained in ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), must be considered to be superseded by the 1992 Cable Act.

B. Regulation of Basic Service Tier

24. In paragraphs 19-28 of the NPRM, the Commission addresses issues relative to the filing for, and approval or revocation by the Commission of, certification by a franchising authority to regulate the rates for basic cable service. In paragraph 21, the Commission discusses the possibility that two or more communities served by that same cable system could file a joint certification and proposes to allow such joint certification. At the same time, the Commission asks whether it might provide incentives for coordinated activities where joint filings are not made voluntarily. The Commission asks further whether

such coordination should be required as part of the certification process. In this context, the Commission seeks comment on the "impact of franchising authorities' decisions to proceed independently on the Act's requirement that an operator's rate structure be uniform throughout a geographic area." (NPRM, para. 21) The Commission goes on to ask "how under such circumstances, might a cable operator be assured that it can fulfill the uniform rate structure requirement [of Section 623(d)]?" (Id.)

25. Section 623(d) which purports to require "a uniform rate structure throughout the geographic area served by a cable system is discussed at length in paragraphs 111-115 of the NPRM. The Commission seeks comment on whether the term "geographic area" was intended to mean the entire geographic area, i.e., all contiguous municipalities served by a cable system. In paragraph 115, the Commission also asks for comment on the advantages and disadvantages generally of interpreting "geographic area" as synonymous with franchise area or as referring to a greater area.

26. We believe that the term "geographic area" to the extent relevant to basic service should be construed to mean franchise area, i.e., the area in which the cable operator is authorized to construct or operate a cable system pursuant to a single franchise. In this regard, we note that Section 623(a)(2) provides that regulation of basic service rates is authorized where a cable system is not subject to effective competition. On the other hand, the term "franchise" is defined in terms of an action by a franchising authority "which authorizes the construction or operation of a cable system" such that any single governmental unit which is also a cable franchising authority has the power to authorize the

construction of a system. (Section 602(10))⁸ Also, Section 623(l)(1) defines the term "effective competition" by reference to the "franchise area" and the number of households therein which are served by additional multichannel video programming distributors.

27. It is apparent from the legislative history that Section 623(d) derives from the Senate Bill, whereas the bulk of Section 623 as enacted into law derives from H.R. 4850. (See Conference Report No. 102-862, pp. 62, 65). In this regard, it is noteworthy that the Senate Bill, also based rate regulation authority on the non-existence of effective competition, and defined "effective competition" in terms of the households in the "cable community." The Senate Bill also included a definition of the term cable community to mean "the households in the geographic area in which a cable system provides cable service." Although the apparent "evil" which the Senate intended to address can be found both within a single franchise area and within the entire area served by a cable system, Congress must be presumed to have understood that only in the nation's largest cities is it likely that a single cable system exists solely within a single municipal boundary, that most states do not act as franchising authorities and that, therefore, a statutory provision that would require uniform basic service rates throughout a cable system would conflict with the explicit right of each franchising authority to regulate basic service rates upon certification pursuant to Section 623(a)(3), (4). Thus, the far better view is that Congress intended the

⁸ The term "cable system" is defined in the Act (unchanged from 1984), without reference to the area served; however, for purposes of technical standards the Commission has traditionally defined "cable system" by reference to the discrete area served from a single or principal headend.

uniformity requirement to apply to basic service rates within a single franchise area and not throughout a multiple franchise system.⁹

28. As noted, the Commission asks specifically whether there are any actions it should take to "provide incentives for local entities regulating a single economic entity to coordinate their activities?" Notwithstanding the foregoing analysis of the interrelationship between the certification process and the language concerning a uniform rate structure, and our view that each franchising authority is independently entitled to become certified to regulate basic service rates, NYSCCT supports uniform rates throughout cable systems served from a single headend barring extraordinary differences in costs or density of homes or subscribers per mile. Coordinated regulation of a common service is in the public interest, and the Commission would be well justified in encouraging the same. However, it is not readily apparent that there is any specific rule or regulation that could be adopted and enforced that would achieve more than an informal recommendation. In the final analysis, the authority of separate franchising authorities to act jointly or for a state to act as a franchising authority is a matter of state law.

29. NYSCCT generally concurs with the procedure proposed by the Commission in paragraphs 23 and 24 relative to the certification by franchising authorities to regulate basic service rates. In addition, the Commission should permit state cable regulatory agencies like NYSCCT to file for certification on behalf of all municipal

⁹ The legislative history of the Senate Bill provided that: "[t]his provision is intended to prevent cable operators from having different rate structures in different parts of one cable franchise. This provision is also intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily." (Senate Report 102-92, p. 76).

franchising authorities for those franchise areas lacking effective competition exists. Since the legal authority of municipalities to regulate cable television rates is a matter of state law, a state agency with jurisdiction over cable is competent to ensure that the standards for qualification in Section 623(a)(3) either exist or will be met. In New York State, such a policy could eliminate the need for nearly 1,400 separate certifications.

30. The statute requires that certification will become effective within 30 days of the date it is filed unless the Commission acts to the contrary. The cable franchising authority ought to be required to serve a copy of its application for certification on the franchisee cable operator and provide the Commission with proof of service thereof. Under the 30-day time constraint, the Commission's proposal to make its initial determination on the face of the application appears to be a reasonable one. If no additional information is needed, the certification should become effective on the thirty-first day after filing. If the Commission requests additional information and that information is provided to the Commission within the initial 30-day time period, the certification should be effective as of the thirty-first day unless the Commission acts before such date to disapprove. Whether it should it be necessary for the Commission to acknowledge receipt of the additional information (and its compliance with the request) is best left to the Commission to determine consistent with its resources, provided that the policy adopted enables all parties certainty that the certification is effective on the thirty-first day. Since the Commission has the power to revoke certification as well as to deny a request for initial certification, and the duty to assume rate regulation functions once a request for certification is made, the only

way a cable operator may be harmed is if it is later determined that effective competition exists.

C. Customer Changes

31. In paragraphs 74-78 of the NPRM, the Commission discusses Section 623(b)(5)(c) which pertains to charges for changes in subscriber selection of services or equipment subject to regulation under this section. The statute requires the Commission to adopt standards and procedures to prevent unreasonable charges for such changes and that the charges must be based on cost which do not exceed nominal amounts if a change can be affected solely by coded entry on a computer terminal or by other similar simple message."

32. In New York State, statutory law and NYSCCT regulations provide for changes in service without a charge during a specified period of time whenever a network, i.e., programming service, is removed from the cable system or is moved from one service tier to another. For example, if a programming service currently being carried on a "higher tier of service" is either dropped from the system altogether or placed on a "lower" tier of service, a subscriber to the affected higher tier may downgrade his or her service free of charge for a period of 45 days from the receipt of notice of the change. (Cable operators are required to give notice of a change 30 days in advance unless they do not have knowledge of the change at such time in which event they are required to give notice within five days of when they actually receive knowledge.) Conversely, if a programming service provided on the entry level basic service is moved to a higher tier, a person who subscribes

only to the basic service may upgrade to the higher tier free of charge within the same time period.¹⁰ This law has been upheld in federal court as a reasonable consumer protection measure which did not conflict with Section 623 of the Cable Act of 1984. (CTANY v. Finneran, et al., 954 F.2d 91 (1992)) Since it is based upon a change in circumstances, such law should continue to apply notwithstanding the Congressional directive that the Commission promulgate standards applicable to change in service tiers generally.¹¹

33. It appears to have been the intent of Congress that the Commission establish standards which would prevent cable operators from penalizing subscribers who wish to change tiers, particularly subscribers who downgrade from a higher to a lower tier. In recent years, cable companies have retiered their services by splitting basic service into two services -- an entry level essentially broadcast, basic service, and a separate tier of cable programming services. In the early cases, cable operators were quoting charges for a "change in service from the expanded service to the broadcast service" well in excess of the ordinary installation charge for the expanded service. NYSCCT assumes that this is the kind of practice that Congress was concerned about and agrees that cable operators should not be free unilaterally to charge consumers for changing to the new lower basic service in a manner that is designed to "discourage subscribers from making such a selection." (Senate Report No. 102-68, p. 84)

¹⁰ New York law provides special remedies for subscribers who may have been induced to subscribe to basic service in order to get a particular programming service that is then moved to a higher tier within six months.

¹¹ NYSCCT rules also provide for a free downgrade after six months continuous subscription to the same service tier.

34. On the other hand, it also appears that Congress intended that cable companies be permitted to impose "reasonable charges or fees based on actual costs" of offering new tiers. One important question is whether cable operators should impose such costs on the initial offering of the new broadcast basic service or upon an initial retiering even of a different nature. Based on the experience of NYSCCT, together with the existing state statute which assures its subscribers are informed of changes and given a fair opportunity to exercise real choice, NYSCCT urges the Commission to prohibit the imposition of any charges for the initial retiering of a basic cable service. We suggest that the Commission consider a policy which would prohibit a cable operator from imposing any charge for a change of service tier that would exceed the charge for the initial installation of such service tier. In other words, cable operators should not make any profit on a change in service (or, indeed, on a change in equipment) which would exceed the profit made on an initial installation. Finally, since cable operators have every incentive to promote their services and to encourage subscribers to buy higher tiers, there is no reason for the Commission to establish rules concerning so-called "upgrade charges" except in the case, as in New York, where a programming service is moved from a lower to a higher tier. In those circumstances, the Commission should adopt the same approach as New York State.

35. Finally, the Commission proposes in paragraph 76 two alternatives applicable to changes in service and, in paragraph 77, similar alternatives applicable to changes in equipment. The Commission asks whether the charges should be based on actual cost plus a reasonable profit or only nominal costs when change in service requires more than the simple method of encoding a computer. As a general matter, it should be noted